

No. 12,924

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

LINCOLN MINING COMPANY, INC., a corporation,

Debtor.

G. McGUIRE PIERCE,

Appellant,

vs.

LINCOLN MINING COMPANY, INC., a corporation,

Appellee.

POINTS AND AUTHORITIES IN OPPOSITION
TO MOTION TO DISMISS APPEAL.

HAWKINS & CANNON,

125 South Second Street,
Las Vegas, Nevada,

KYLE Z. GRAINGER,

354 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellant.

TOPICAL INDEX

PAGE

I.

Under this subdivision, answer is made to Points 1, 2 and 3 above set forth.....	2
---	---

II.

Under this subdivision, answer is made to Point 4 of the ap- pellee's reasons upon which his motion is based.....	8
--	---

III.

Answer to various points set forth in the notice of motion to dismiss appeal	9
---	---

IV.

Questions involved in this appeal which make G. McGuire Pierce, appellant herein, a proper appellant.....	11
Conclusion	13

TABLE OF AUTHORITIES CITED

CASES

PAGE

Frank et al. v. Drinc-o-Matic, 136 F. 2d 906.....	7
Herbert Glassman v. Philadelphia Rapid Transit Co., et al., 82 F. 2d 397.....	7
Loomis v. Gila County, 103 F. 2d 312.....	13
Warner Quinlan Co., Inc., In the Matter of, 17 Fed. Supp. 659	7

STATUTES

Bankruptcy Act, Chap. X, Sec. 116.....	12
Bankruptcy Act, Chap. X, Sec. 116(1)	11, 12
Bankruptcy Act, Chap. X, Sec. 116(3).....	7
Bankruptcy Act, Chap. X, Sec. 202.....	12

TEXTBOOKS

6 Collier on Bankruptcy (14th Ed.), pp. 726-732.....	8
--	---

No. 12,924

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

LINCOLN MINING COMPANY, INC., a corporation,
Debtor.

G. McGUIRE PIERCE,

Appellant,

vs.

LINCOLN MINING COMPANY, INC., a corporation,
Appellee.

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS APPEAL.

G. McGuire Pierce, appellant in this proceeding, now files herein his points and authorities in opposition to motion of Lincoln Mining Company, Inc., debtor and appellee, for an order dismissing the appeal of G. McGuire Pierce in the above entitled proceeding.

The motion of said appellee is based upon the following grounds as set forth in the notice of motion, to wit:

1. That G. McGuire Pierce is not a party to the action and has no appealable interest and has no right of appeal.

2. That G. McGuire Pierce is not a stockholder, creditor, or otherwise interested in these proceedings.
3. That G. McGuire Pierce's only appearance in this action was his letter to George W. Thiriot, President of the Lincoln Mining Company, Inc., which formed the basis of the amended plan of reorganization, all under date of November 6, 1951.
4. That upon the final hearing by the court below of the confirmation of the plan it was disaffirmed and the proceedings dismissed.

I.

Under This Subdivision, Answer Is Made to Points 1, 2 and 3 Above Set Forth.

An examination of the record will disclose that the above points are not well grounded. It is not correct to say that G. McGuire Pierce's only appearance in this action was a letter to George W. Thiriot, President of Lincoln Mining Company, Inc. The facts in this case in respect to the interest of G. McGuire Pierce are as follows:

On November 21, 1950, G. McGuire Pierce made a written offer to the debtor corporation [Tr. p. 56] wherein he offered to lend moneys to that corporation to pay its preferred and unsecured obligations, to assume a certain secured claim of the Clark County Wholesale Mercantile Co., Inc., and to post a surety bond to insure payment to the Atolia Mining Company of sums asserted to be owing by it and which claim is in litigation. By the terms of said offer a note was to be executed evidencing the said sums,

which note was to be secured by a chattel and realty mortgage on the mining properties owned by the debtor. It was likewise provided in said offer that the debtor was to execute a lease and option in accordance with the copy of same attached to the offer, and provided further that the debtor should transfer to said G. McGuire Pierce seventy-five (75) shares of treasury stock then held by debtor corporation. This offer was amended in writing to provide a different mode of settlement in respect to the Atolia Mining Company claim to comply with the wishes of the Atolia Mining Company. [Tr. p. 74.]

At a meeting of creditors on November 21, 1950, the offer of G. McGuire Pierce was presented for consideration to the interested parties. [Tr. p. 136.] At said meeting a modified plan submitted by the President of said debtor corporation and based on the offer of said G. McGuire Pierce, was also presented for consideration to the creditors and interested parties. After the matter of the offer had been heard during the morning session of the Court, a recess was had until 2 o'clock p. m. at which time Mr. Morse, attorney for debtor corporation, asked and received permission of the court to talk over the lease with the interested parties. Upon resumption of the hearing Mr. Morse stated that it was the opinion of the Board of Directors that the lease be signed [Tr. p. 142], and the Referee at that time said:

“ . . . Mr. Morse announces that the offer to the debtor in reorganization, with a copy of the proposed agreement, has been accepted by the stockholders. Have you signed the lease and option agreement?”

To this statement Mr. Morse responded:

“No, but we will do so your Honor.”

On November 28, 1950, the Referee made his findings and reports and submitted same to the Honorable Judge of the United States District Court. [Tr. p. 76.] Among other things, he found and reported that G. McGuire Pierce had submitted the offer hereinbefore referred to and that said offer and the corporate acceptance of same was just and equitable and that an order attached as prepared by the parties, might be signed *ex parte* as all had had copies. [Tr. p. 79.]

On November 29, 1950, the Honorable Judge of the District Court signed an order approving the offer to the debtor in reorganization, as amended, made to the debtor by G. McGuire Pierce, and ordered that the lease and option, entered into on November 21, 1951, be approved, and authorized the debtor and lessee to proceed in accordance with said lease. It was also ordered that the said Pierce and the said debtor proceed to comply with the other matters provided for in the offer. [Tr. p. 82.] This order was signed with the consent of all the parties and without objection of the debtor corporation. [Tr. p. 117.] A modified plan of reorganization as aforesaid was filed by G. W. Thiriot, President of the Debtor Corporation and the Debtor organization [Tr. p. 48] which was based upon matters and things contained in the offer of said Pierce. On December 15, 1950, the Lincoln Mining Company, Inc., debtor, filed objections to the confirmation of the said modified plan [Tr. p. 94] and in said instrument likewise asked that the lease theretofore given to G. McGuire Pierce be declared null and void. G. McGuire Pierce without objection and with the consent of the Court filed a reply to said pleading of the Lincoln Mining Company, Inc., Debtor. [Tr. p. 167.] Later hearings were had before the Honorable Judge at which hearings debtor was

represented by counsel and G. McGuire Pierce was represented by counsel without any objection being made to such appearance. The order which is subject matter of the appeal resulted from such hearings. After the Findings of Fact the said order reads as follows [Tr. p. 120]:

“1. That the confirmation of the said amended and approved plan of reorganization referred to in the Order to Show Cause herein be, and it hereby is refused.

“2. That the lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc., and G. McGuire Pierce be, and the same hereby is, rejected and is hereby declared null and void and of no effect.

“3. That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement.

“4. That after the filing with the Clerk of this Court of proper vouchers exhibiting the payment by the debtor corporation of all approved claims of creditors, expenses of these proceedings, and reimbursement to G. McGuire Pierce in a sum agreed upon by the parties, or determined by the Referee or the Judge of this Court, the Judge of this Court will, after hearing upon notice to the debtor, stockholders and creditors then remaining unpaid, enter an order either adjudging the debtor a bankrupt and directing the bankruptcy be proceeded with or dismissing the

proceedings as in the opinion of the Judge may be for the interests of creditors.

“The Court reserved jurisdiction of these proceedings to make such other and further orders under the Bankruptcy Act as to the Court may seem just and proper.

“Dated: This 9th day of March, 1951, at Las Vegas, Nevada.

s/ ROGER T. FOLEY,
United States District Judge.

(Endorsed:) Filed March 9, 1951.”

In findings of fact preceding the order Finding 8 provides as follows:

“8. That the lessee in said lease, G. McGuire Pierce, is entitled to be reimbursed, after November 29, 1950, the date the Order of this Court was entered approving the proposed plan of reorganization, for monies actually expended in furtherance of and pursuant of said plan.”

If it should be found that the lease entered into with the approval of the Court could be rejected and cancelled, the portion of the order relative to the determination of the proper amount to be paid to G. McGuire Pierce improperly limits the amount to be paid to monies actually expended in furtherance of and pursuant to the plan instead of an amount covering damages for loss of the full benefits of the lease of which he was deprived.

We think the foregoing statement of facts discloses that the statement under Point 3 of Appellee's reasons for motion, namely, that G. McGuire Pierce's only appearance in this action was a letter to George W. Thiriot,

President of Lincoln Mining Company, Inc. is far from correct, and further is a complete answer to points 1, 2 and 3 in the enumeration of reasons for the granting of the motion.

It appears that a lease and option was entered into between the debtor corporation and G. McGuire Pierce subject to the approval of the court and that thereafter the court not only approved the lease and option and the offer of G. McGuire Pierce but directed that parties proceed in accordance therewith. No appeal was ever taken from said order. The court had ample authority to make the order. Section 116 of Chapter X of the Bankruptcy Act in enumerating certain of the jurisdictional powers of the judge provides in subdivision 3 that the judge may:

“ . . . authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;”

This provision restates the substance of form 77-B(c) (3½).

Frank et al. v. Drinc-o-Matic (C. C. A. 2d), 136 F. 2d 906;

Herbert Glassman v. Philadelphia Rapid Transit Co., et al., (C. C. A. 3d), 82 F. 2d 397;

In the Matter of Warner Quinlan Co., Inc., Debtor D. C. (So. Dist. of N. Y.), 17 Fed. Supp. 659.

and numerous other cases cited in Collier's on Bankruptcy 14th Ed. Vol. 6, pp. 726-732 are also authority in respect to a lease or sale of debtor's property.

It is this lease wherein G. McGuire Pierce is the lessee, that the order appealed from rejects and declares null and void. It is impossible, as we see it, that the property rights of a party could be invaded as above set forth yet that party be not an interested party.

II.

Under This Subdivision, Answer Is Made to Point 4 of the Appellee's Reasons Upon Which His Motion Is Based.

This ground for the granting of the motion is that upon the final hearing by the court below of the confirmation of the plan, it was disaffirmed and the proceedings dismissed. It is true that by the order appealed from confirmation of the plan was refused but the bankruptcy proceedings have not been dismissed. We have hereinbefore quoted the order of the court and in subdivision 4 thereof it will be noted that the order provided that the judge of the court, after notice to the debtor, stockholders and creditors then remaining unpaid, will enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceedings, as in the opinion of the judge may be for the best interest of creditors. No order of dismissal can of course be properly entered until the determination of this appeal.

III.

Answer to Various Points Set Forth in the Notice of
Motion to Dismiss Appeal.

On pages 13 and 14 of the notice of motion, we find the following:

“That it affirmatively appears from the records and files herein:

(a) That all of the creditors of the debtor corporation have been paid by the corporation.

(b) That all the expenses of these proceedings have been paid by the debtor corporation.

(c) That the debtor corporation and all of its stockholders have moved that these proceedings be dismissed in the respondent Court.

(d) That G. McGuire Pierce refused to comply with the order of Court of the 9th day of March, 1951 and April 5, 1951 for adjudication of his claim, if any, for reimbursement for his expenses, if any. He thereby waived any claim he may have had, and has no right under the Bankruptcy Act to a hearing of his alleged claim in this Court.

(e) That for all the above reasons all questions in this case have become moot, and the only order remaining to be ordered is a dismissal of this appeal by this Honorable Court and the dismissal of the proceedings by the respondent Court.”

In respect to subdivisions (a) and (b) above set forth, assuredly it is not within the power of the corporation by voluntarily paying its creditors and the expenses of these proceedings to preclude this appellant from asserting his property rights. If appellant's lease is upheld it may be that the money to be paid creditors should be paid over to the debtor corporation to reimburse it for payment that otherwise would have been made by appellant.

In respect to subdivision (c), the motion of the debtor corporation that this proceeding be dismissed must await the result of this appeal.

In respect to subdivision (d), it is urged that appellant G. McGuire Pierce has refused to comply with the order of the court on the 9th of March, 1951, being the order appealed from in this proceeding, and an order dated the 5th of April, 1951 for adjudication of his claim, if any, to reimbursement for his expenses, if any, and thereby has waived any claim he may have had. The order of the court dated the 5th day of April, 1951 is set forth on pages 12 and 13 of appellee's notice of motion. Under this order it was directed that proceedings be referred to Frank W. Ingram, Esquire, Referee in Bankruptcy for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as reimbursement for injuries resulting from the rejection of the plan and cancellation of the lease referred to and the findings of fact and order refusing confirmation of plan. Appellant G. McGuire Pierce has not refused to comply with the order of the court of the 9th of March, 1951 or of the order of court of April 5, 1951 other than that he has taken an appeal from the order of the 9th day of March, 1951 and the order of the 5th day of April, 1951, which was in furtherance of the order of the 9th day of March, 1951, is merely held in abeyance as to any hearings by the Honorable Referee in Bankruptcy until the determination of this appeal.

In respect to subdivision (e) that all questions in this case have become moot, we need call attention only to the various questions presented on the appeal. No dismissal of the proceedings should be had until this appeal is heard, for otherwise property rights of the appellant would be invaded.

IV.

Questions Involved in This Appeal Which Make G. McGuire Pierce, Appellant Herein, a Proper Appellant.

(a) G. McGuire Pierce was the lessee under a lease entered into between the corporation and himself after the approval of the debtor's original petition for reorganization. Said lease also contained an option agreement. The order, judgment and decree of the Court appealed from, rejected this lease and option agreement and decreed that same was null and void and of no effect. Without objection and with the consent of the court, appellant urged that the court could not properly make such a decree. In connection with this point the question also arises whether Section 116 of the Bankruptcy Act, subdivision (1), in relation to executory contracts of the debtor permits the rejection of executory contracts entered into in the course of administration of the debtor's estate or is confined to the rejection of executory contracts of the debtor entered into prior to the approval of the petition.

(b) The order, judgment and decree of the court decreed that reimbursement should be paid to G. McGuire Pierce for injuries resulting from the cancellation of said lease but by the findings of fact limited said reimbursement to moneys actually expended in furtherance of and pursuant to said plan and did not provide for the full dam-

ages that would be sustained by the lessee by such rejection and cancellation. If the court could properly cancel the lease and option agreement, the question then arises was the court in error in so limiting the amount of damages to be paid. If Section 116 of Ch. X of the Bankruptcy Act is properly applicable to lease made pursuant to order of court after the approval of the debtor's original petition, then by the terms of Section 202 said G. McGuire Pierce would become a creditor with full right of appeal. That section provides as follows:

"In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter . . . any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor." U. S. C. A. Par. 602.

(c) The order, judgment and decree of the Court decreed that the confirmation of the amended plan of reorganization be refused.

In the working out of the consideration to be paid by appellant to the corporation, the confusion that would arise as to the method of payment if the plan were not confirmed, gave appellant a direct interest in the question of the confirmation and he was accorded the right to file his reply by the court and without objection participated in the proceedings relating to the confirmation of the plan. Furthermore, if the construction of the Honorable Trial Judge is correct that the clause of Section 116 relating to executory contracts is applicable then appellant is a creditor entitled to appeal from an order relating to confirmation. In our appeal we contend that the court had no right

by virtue of said section to reject and cancel said lease and option agreement but contend further if it is held that the court did have such right under said section that we are entitled to receive reimbursement and damages in a greater amount than provided by the order of the court.

Conclusion.

We submit that the foregoing shows that G. McGuire Pierce, the appellant herein, was a party directly interested in the proceeding and in a far different position than that of the trustee referred to in the case of *Loomis v. Gila County* (C. C. A. 9th), 103 F. 2d 312, cited by appellee and assuredly both by permission of court and direct interest was entitled to protect his property rights. It is not consonant with the American concept of justice that a man's property may be taken from him without the right on his part to have his day in Court.

Respectfully submitted,

HAWKINS & CANNON,

KYLE Z. GRAINGER,

By KYLE Z. GRAINGER,

Attorneys for Appellant.

